

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1274

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WINCEL HENDRIX,

Appellant.

Docket No. 74-1274

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM EPSTEIN,
Of Counsel

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PAGINATION AS IN ORIGINAL COPY

UNITED STATES DISTRICT COURT

JUDGE MOTLEY

8633.639

Form No. 100

TITLE OF CASE

THE UNITED STATES

vs.

ATTORNEYS

For U. S.: 261-6438

S. Andrew Schaffer, AUSA

1) WINCEL HENDRIX

2) CERALD CAVIN, a/k/a Jerry Golden

3) JOHN TURNER

For Defendant:

07

STATISTICAL RECORD

COSTS

DATE

NAME OR RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

J.S. 3 mailed

Marshal

Violation comp. # -----

Docket fee

Title 21

Sec. 846 conspiracy to viol.
narcotic laws (ct.1) -
§12, 841(a)(1), §12(b)(1)(A)
distr. & poss. with intent
to distr. heroin, I (ct.2)

THE COUNTS--

DATE

PROCEEDINGS

4-5-73

Filed Indictment

Assigned to Judge Motley as a related matter (73 CR 611)

7-30-73

G. GAVIN - Atty. present PLEADS NOT GUILTY 10 days for motions after Motley, J. returns
Bail \$5,000 P.R.B. signed by deft & parents secured by \$500 cash to be paid
by 4 p.m. today.....Ward, J...

1-7-73

J. TURNER - Atty. present. Withdraws plea of not guilty and PLEADS GUILTY to count
1(ONE) P.S.I. ordered. Deft cont'd on present bail. Sentenced adja to Dec. 12-73
at 11 a.m.....Motley, J.

11-7-73

J. TURNER - Filed petition to enter plea of guilty FRCP Rule 10 and 11.

12-20-73

W. HENDRIX)

G. GAVIN) - Trial began (Atty's present)

12-20-73

Trial cont'd & concluded. Jury finds deft's GUILTY as charged in cts. 1 & 2
P.S.I. Ordered. sentence adj'd to 2-6-74 11a.m. Deft Hendrix REMANDED.
GAVIN cont'd on present bail.....Motley, J.....

DATE

PROCEEDINGS

1-3-74 JOHN TURNER - Filed Judgment(Harold Schwartz, atty. present) the deft is sentenced to FIVE YEARS on Count 1...Execution of sentence is suspended. Deft is placed on probation for a period of FIVE YEARS, subject to the standing probation order of this Court. Count 2 dismissed on deft's motion with the consent of the Govt.....MOTLEY, J.....Docketed 1-9-74

1-28-74 Filed transcript of record of proceedings, dated 11-7-73.

2-22-74 / GERALD GAVIN
Filed notice of appeal from final judgment of 2-21-74....Leave to appeal in forma pauperis is granted....Motley, J. Copies sent to Harry Pollack 299 B'Way NYC and U.S. Atty's Office Ent. on docket 2-26-74.

2-28-74 WINCEL HENDRIX - Filed notice of appeal from final judgment of 2-21-74....Memo endorsed. The filing of the notice of appeal is granted without payment of statutory filing fee....Motley, J. (Copy mailed to deft at 2346 97th St. East, Elmhurst, N.Y. and to U.S. Atty. S.D.N.Y. Ent. on docket 2-28-74.

3-5-74 GERALD GAVIN - Filed stip. that appeal filed on Feb. 21, 1974 be and hereby discontinued.

2-21-74 WINCEL HENDRIX - Filed Judgment(Atty. R. Marvin McKeller present) the deft is committed for imprisonment for a period of THREE YEARS....Pursuant to provisions of Ti. 21, Section 841, United States Code, the deft. is placed on Special Parole for a term of FIVE YEARS to commence upon expiration of confinement....MOTLEY, J. (Ent. on docket 3-7-74)

2-21-74 GERALD GAVIN a/k/a Jerry Golden - Filed Judgment(Atty. Harry Pollack present) the deft is committed for TREATMENT and supervision pursuant to Section 5010(b) of Ti. 18, U.S. Code until discharged by the Federal Youth Correction Division of the Board of Parole as provided in Section 5017(c) of Ti. 18, U.S. Code....Motley, J. (Ent. on docket 3-7-74)

3-6-74 G. GAVIN - Mailed original CJA copy 1 to the A.O. Wash. D.C. for payment...Motley, J.

3-15-74 W. HENDRIX Trial commitment & entered return. Deft. delivered to F.D.H. on 2-21-74

3-15-74 G. GAVIN Trial commitment & entered return. Deft. delivered to F.D.H. on 2-21-74

A TRUE COPY

RAYMOND F. BURCHARDT, Clerk

By

Deputy Clerk

REV. 5-27-72
Intent to distribute narcotic drug.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CRIM. 669

----- -x
UNITED STATES OF AMERICA,

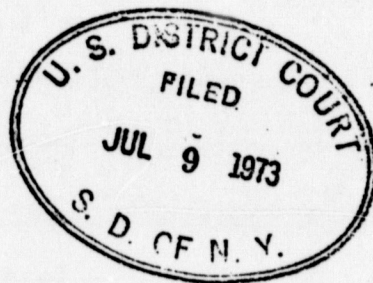
-v-

WINCEL HENDRIX, GERALD GAVIN,
a/k/a Jerry Golden and
JOHN TURNER,

Defendants .

INDICTMENT

73 Cr.



----- -x
The Grand Jury charges:

1. From on or about the 1st day of August, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, WINCEL HENDRIX, GERALD GAVIN, a/k/a Jerry Golden, and JOHN TURNER,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

USA-33s-538 - p.2 - IND./INF. (Conspiracy to distribute and possess with
Ed. 5/1/71 intent to distribute narcotic drug.)

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about January 5, 1973 defendants WINCEL HENDRIX, GERALD GAVIN a/k/a Jerry Golden, and JOHN TURNER went to Apartment 12-H, 405 East 105th Street, New York, New York.

2. On or about January 5, 1973, defendant WINCEL HENDRIX delivered to defendant JOHN TURNER approximately 18 grams of heroin hydrochloride.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 5th day of January, 1973
in the Southern District of New York, WINCEL HENDRIX,
GERALD GAVIN, a/k/a Jerry Golden, and JOHN TURNER,

the defendants , unlawfully, intentionally and knowingly
did distribute and possess with intent to distribute a
Schedule I narcotic drug controlled substance, to wit,
approximately 18.02 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)
and Title 18, United States Code, Section 2.

Mrs. June M. Burke
Foreman

Paul J. Curran
PAUL J. CURRAN
United States Attorney

1 rdv 40

2 and his presence, his taking these orders was an essential
3 participation in the conspiracy for which these defen-
4 dants are on trial.

5 I thank you for your attention and I trust
6 you will render a fair and impartial verdict in this case
7 in accordance with the law. Thank you all very much.

8 THE COURT: At this time we will excuse the
9 jury for about ten minutes. We will take a ten minute
10 recess, after which the Court will charge the jury.

11 (recess taken.)

12 (In open court. Jury present.)
13

14 CHARGE OF THE COURT

15 THE COURT: First of all, ladies and gentlemen,
16 I would like to thank you for your patience and to thank
17 you for your cooperation in being prompt. I know that in
18 order to serve on this jury each of you has had to make some
19 personal or business sacrifices in order to do so. But as
20 I reminded you when the trial commenced, we all have a
21 stake in the fair and impartial administration of justice.
22 Consequently, I am certain that any sacrifice you had to
23 make, whether business or personal, to serve on this jury,
24 that you were glad to do so in the interest of the fair
25 and impartial administration of justice.

1 rdy 41

2 Now, I trust that you will bear with me now
3 and give me that same degree of attention which you have
4 given throughout the trial, so that you may carefully
5 understand the legal principles which you are to apply
6 to the facts in this case as you find them.

7 Now, as you approach the performance of your
8 function in this case, which is to determine the guilt or
9 innocence of these defendants, please remember that you
10 must weigh the evidence calmly and dispassionately, with-
11 out sympathy or prejudice for or against either the Govern-
12 ment or either of the defendants. Every defendant appearing
13 before this Court is entitled to a fair and impartial
14 trial, regardless of his occupation or station in life.

15 The fact that the Government is a party here,
16 that the action is brought in the name of the United
17 States of America entitles it to no more consideration
18 than is accorded to any other party to a litigation.

19 By the same token, it is entitled to no less
20 consideration. And that is because all parties, Government
21 and individuals alike, stand equal before the law.

22 Now, there are two separate counts or charges
23 in the indictment and you must return a verdict as to
24 each count and you must return a verdict separately as
25 to each count, as to each defendant.

1 rdv 42

2 Now, your verdict as to each count, as to each defendant,
3 must be based solely on the evidence which has been presented
4 here, and I want to remind you again what the evidence in
5 a case is. The evidence in a case is the testimony that
6 you heard from the witnesses who took the witness stand
7 right here, the exhibits which have been actually received
8 in evidence, and any stipulations as to certain facts which
9 the lawyers entered into, and nothing else.

10 I want to remind you again, that statements
11 made by lawyers are not evidence. Now, you just heard the
12 closing argument, or summations, by the lawyers in which
13 they gave you their views and their recollection of the
14 facts. The purpose of that was to help you to review the
15 evidence. And some of the things which they said may have
16 accorded with your recollection and some of them may not
17 have. But it is your recollection which controls because
18 the jury is the exclusive finder of the facts. And what
19 lawyers say the facts are is not to control if your recol-
20 lection of the facts differs from anything which they said.

21 So, too, anything which I may have said during
22 the trial or may say during the course of these instructions,
23 if it does not accord with your recollection, it is your
24 recollection which controls.

25 Now, as jurors in a case you pass upon the weight

rdv 43

of the evidence. You determine the credibility of the witnesses and you resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony and on the evidence in the case.

As you know, it is my function now to instruct you as to the law, and I suggest to you that if you accept these instructions as to the law and apply these instructions or these legal principles to the facts as you find them, then the logical result of that application will be a verdict in the case as to each count and as to each defendant.

Now, I want to caution you that you are not to single out any one instruction alone as stating the law, but you must consider these instructions as a whole. You are not to assume that I have any opinion as to the guilt or innocence of these defendants or the truth or falsity of any of the charges. The fact that I granted motions or denied motions in the course of the trial is not to be taken by you as any indication on my part that the Court believes the defendants are guilty or innocent or the charges to be true or false.

As I told you in the beginning, my rulings on these motions and objections had to do with questions of law

rdv 44

and not with questions of fact which are now being submitted to you for your determination as to what the facts are.

Now, if during the course of the trial a question was asked and an objection interposed and I sustained the objection, you are disregard the question and any alleged facts contained in that question. Similarly, if I ruled that an answer be stricken from the record, you are to disregard both the question and the answer in your deliberations.

I want to tell you about the difference between direct evidence and circumstantial evidence, because we have both in this case and you usually do in criminal cases or in other cases, civil cases , for that matter.

Now, direct evidence tends to show the fact in issue without need for any other amplification, although, of course, there is always the question of whether that particular evidence is to be believed. Circumstantial evidence, on the other hand, tends to show facts from which the fact in issue may reasonably be inferred. It is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to leave the mind to infer that the facts sought to be established are true.

rdv 45

1
2 If you have served on a jury before, you may
3 have heard the judge give this example of circumstantial
4 evidence, and that is when you are in a building like
5 this and you are on a higher floor and you go over to the
6 window and look out , it is sometimes difficult to tell
7 whether or not it's raining outside. But, if you go over
8 to the window and look down into the street below and you
9 see people with their umbrellas up, why then you may come
10 to the conclusion that it's raining. You have the direct
11 evidence of your senses, which tells you that the umbrellas
12 are up, and this constitutes circumstantial evidence from
13 which you may conclude that it is raining.

14 In other words, again, circumstantial evidence
15 consists of the proof of facts from which the jury may
16 infer by a process of reasoning on the facts in issue. It
17 is not necessary that the participation of a defendant
18 be shown by direct evidence. The connection may be
19 inferred by such facts and circumstances in evidence as
20 legitimately tend to sustain that inference.

21 Now, knowledge and wilfullness of a defendant
22 need not be proved by direct evidence. Like any other
23 fact in issue, it may be established by circumstantial
24 evidence. The significant fact is a defendant's state
25 of mind.

rdv 46

Now, it's obviously impossible to prove directly the operation of a defendant's mind because you can't look into a person's mind and see what his or her intentions are or were, but the proof of the circumstances surrounding the defendant's activities may well supply an adequate and convincing basis for finding that a defendant acted knowingly, willfully and intentionally.

In other words, the actions of a person must be put in their time and place, just as the full meaning of the word is commonly understood only in its relation to other words in a sentence or in its context. So the meaning of a particular act or conduct may depend on the circumstances surrounding that act or conduct.

In determining the issue of intent you are entitled to consider any statements made by a defendant which are in evidence and acts done by an accused, and all facts and circumstances in evidence which may aid you in determining a defendant's state of mind. You may consider such things as the age, background, and experience of a defendant and whether such facts make it likely or unlikely, probable or improbable that a defendant fully and precisely understood what he was doing in regard to a transaction and whether relevant in relation to others.

Now, as you know, each defendant has entered

1 rdv 47

2 a plea of not guilty to each charge made against them
3 in this indictment. As I have told you from the very
4 beginning, as a result of that the Government, if each
5 defendant is to be convicted, has the burden of proving
6 each defendant guilty beyond a reasonable doubt.

7 Now, that is a burden that never shifts.
8 It remains upon the Government throughout the entire
9 trial. As I told you before, in a criminal case a defen-
10 dant does not have to prove that he is innocent. On the
11 contrary, he is presumed to be innocent of the accusa-
12 tions or charges made against him in an indictment.

13 Now, this presumption of innocence, as I
14 said, was in the favor of each of these defendants when
15 the trial started. It remains in there throughout the
16 entire trial. It remains in their favor even as I instruct
17 you now. It remains in their favor even when you retire
18 to the jury room to deliberate.

19 That presumption of innocence is removed only
20 if and when, after your deliberations in the jury room,
21 you are convinced that the Government has sustained its
22 burden of proof, and that is to prove the defendants
23 guilty as charged beyond a reasonable doubt.

24 Now, the question which naturally comes up is,
25 what is a reasonable doubt? The words almost define

rdv 48

themselves. Reasonable doubt is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has, after carefully weighing all the evidence, the kind of doubt which would make one hesitate to act. It means a doubt which is substantial and not merely shadowy.

Reasonable doubt is one which appeals to your reason, your judgment, your common sense and your experiences in life. It is not caprice, whim, or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

Now, if after fair and impartial consideration of all the evidence you can candidly and honestly say that you are not satisfied of the guilt of a particular defendant, whom you are then considering, and that you do not have an abiding conviction of that particular defendant's guilt, such a conviction as you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have a reasonable doubt. And in that circumstance it is your duty to acquit that particular defendant.

On the other hand, if after such a fair and

1 rdv 49

2 impartial consideration of all the evidence you can candidly
3 and honestly say that you are satisfied of the guilt of a
4 particular defendant, whom you are then considering, that
5 you do have an abiding conviction as to that particular
6 defendant's guilt, such a conviction as you would be
7 willing to act upon unhesitatingly in important and
8 weighty matters in personal affairs of your own life,
9 then you have no reasonable doubt. And in that circum-
10 stance you may convict that particular defendant.

11 Now, a reasonable doubt does not mean a posi-
12 tive certainty or beyond all possible doubt. It is
13 practically impossible for a person to be absolutely
14 and completely convinced of any controverted fact which
15 by its nature is not susceptible to mathematical certainty.
16 In consequence, the law in a criminal case is that it is
17 sufficient, if the guilt of a defendant has been established
18 beyond a reasonable doubt, not beyond all possible doubt.

19 As I told you before, you as jurors are the
20 sole and exclusive judges of the credibility of the wit-
21 nesses who testify here and of the weight which their
22 testimony deserves. Now, you know, of course, there is
23 no automatic way to determine who is telling the truth
24 and who is not. Credibility can be equated with believ-
25 ability and reliability. If a witness is credible you say

1 rdv 50

2 he is believable and reliable. If he is incredible, you
3 say he is unbelievable. There is nothing mysterious
4 about these words.

5 Now, by what yardstick are you to judge the
6 credibility of witnesses? Each of you has given careful
7 attention to the witnesses as they testified right here
8 before you. You observed the witnesses.

9 Issues of fact are presented for your deter-
10 mination and to a large extent the resolution of them
11 depends upon the credibility which you attribute to the
12 witnesses and the support or lack of support they receive
13 from other evidence in the case. An issue of fact, is
14 presented, for example, when one witness testifies that
15 a certain event occurred and another witness testified
16 that that event did not occur.

17 Your duty is to decide the issues of fact.
18 You have to decide which witness is telling the truth and
19 which witness is not. In that connection you use your
20 logic, your reason and your common sense and don't be
21 sidetracked or diverted by what you consider to be a
22 minor or insignificant detail or irrelevancy or by what
23 you consider to be an appeal not to your logic or reason
24 but to mere sentimentality or unthinking passion. I repeat,
25 use your common sense.

1 rdv 51

2 You should carefully scrutinize all the
3 testimony given, both direct and cross examination. The
4 circumstances under which each witness has testified and
5 every matter in evidence which tends to show whether a
6 witness is worthy of belief. Consider each witness'
7 intelligence, motive, and state of mind and demeanor
8 and manner while on the witness stand. Consider witness'
9 ability to observe the matters as to which he has testi-
10 fied and whether he impresses you as having an accurate
11 recollection of these matters. Consider also any relation
12 each witness may bear to either side of the case, the
13 manner in which each witness might be affected by the
14 verdict, and the extent to which, if at all, each witness
15 is either supported or contradicted by other credible
16 evidence in the case.

17 Inconsistencies or discrepancies in the
18 testimony of a witness or between the testimony of different
19 witnesses may or may not cause the jury to discredit such
20 testimony.

21 Now, two or more persons witnessing the same
22 incident or a transaction may see or hear it differently.
23 And, as we all know, innocent misrecollection, like failure
24 of recollection, is not an uncommon experience. Therefore,
25 in weighing the affect of a discrepancy, always consider

1 rdv 52

2 whether it pertains to a matter of importance or an unim-
3 portant detail and whether the discrepancy results from
4 innocent or intentional falsehood.

5 In determining credibility and weight to be
6 given to the testimony of any witness, you must also con-
7 sider the testimony of the Government witnesses. The mere
8 fact that they are employees of the Government entitles
9 them to no more and no less consideration than that accorded
10 any other witness, nor should you be influenced by the num-
11 ber of witnesses a side has called or the number of docu-
12 ments received in evidence.

13 It is the quality of the testimony and other
14 evidence which counts, not the quantity.

15 After making your own judgment you will give
16 the testimony of each witness such credibility, if any,
17 as you think it deserves. Now, if you find that any wit-
18 ness, and this applies to all witnesses who testified here,
19 has willfully testified falsely as to any material matter,
20 you may reject the entire testimony of that witness or you
21 may accept such part or portion as lends itself to your be-
22 lief or which you may find corroborated by other credible
23 evidence in the case.

24 Now, the law does not compel a defendant in a
25 criminal case, as I have told you, to take the witness

1 rdv 53

2 stand and testified or offer any evidence at all, and no
3 presumption of guilt may be raised and no inference of any
4 kind may be drawn from the failure of a defendant to tes-
5 tify. However, a defendant who wishes to testify may do
6 so and is a competent witness. The defendant's testimony,
7 therefore, is to be judged in the same way as that of any
8 other witness, as I have just described to you.

9 As I told you when the trial commenced, an
10 indictment is not proof or evidence. It is merely an
11 accusation or a method or a technique or process whereby
12 persons who are accused by a grand jury are brought into
13 court and then their guilt or innocence is determined by
14 a trial jury such as you are.

15 The indictment in this case names three
16 defendants. However, as you know, only two defendants
17 are on trial here before you. One is Mr. Wincel Hendrix
18 and the other is Mr. Gerald Gavin. Now, they are the only
19 defendants whose guilt or innocence you are called upon to
20 decide. And the guilt or innocence of Mr. Hendrix and the
21 guilt or innocence of Mr. Gavin is to be decided by you,
22 as I have said, on the basis of testimony and on the evidence
23 in the case and on nothing else.

24 That is to say, the fact that another defendant
25 in this case, Mr. John Turner who testified here, has entered

1 rdv 54

2 a plea of guilty to Count 2, is not to be taken by you as
3 any evidence that Mr. Hendrix or Mr. Gavin must also be
4 guilty of the charges made against them. Now, this is
5 because guilt or innocence of a defendant is personal and
6 is to be determined by the jury solely on the basis of the
7 testimony and other evidence in the case and is not to be
8 based on the fact that some other defendant has pleaded
9 guilty.

10 Now, as I have said, during the course of
11 the trial you heard the testimony of Mr. Turner, an indi-
12 vidual who testified concerning his own involvement in
13 the crimes charged in the indictment. He is, therefore,
14 referred to as an accomplice.

15 Under the law in order for one to be an
16 accomplice he must be concerned in the commission of a
17 crime with which the other defendants are charged. In
18 short, he must be a participant in the crime. An accomplice
19 does not become incompetent as a witness because of his own
20 participation in the criminal acts charged. His testimony
21 is not to be rejected unless the jury thinks it has no
22 weight. Like any other testimony, it is to be considered
23 and dealt with by the jury.

24 Such evidence is properly considered by the
25 jury. However, it must be considered with care and scrutiny,

rdv 55

checked up with the other facts in the case and given due weight.

The testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty on a particular count, even though it is not corroborated or supported by other evidence in the case.

Again, as I have said, you should keep in mind that the testimony of an accomplice is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an accomplice unless you believe that unsupported testimony beyond a reasonable doubt.

You are instructed that in weighing the testimony of a Government witness charged as a co-conspirator in the indictment, you may take into account any motive that witness may have in testifying for the Government.

The witness here, Mr. Turner, has pleaded guilty to Count 2 and has not yet been sentenced, as he told you. He testified that he hopes as a result of his cooperation with the Government he will be dealt with leniently. Now, this fact does not disqualify the testimony of that witness, but that fact may well affect the weight you give his testimony in adjudging the guilt or the innocence of these defendants.

1 rdv 56
2 Now we come to the indictment itself,
3 and what I plan to do is to read each count and then
4 explain to you those elements of each count which you
5 must find that the Government has established beyond a
6 reasonable doubt before you can find a defendant guilty
7 of that particular count.

8 Now, before reading the indictment I want
9 to give you, in essence, the claims made by both sides,
10 that is the Government's claim in capsule form, and the
11 claim of the defendants.

12 Now, the Government claims first that during
13 the period from about August 1, '72 until July 9, '73,
14 that's when the indictment was filed, and those are
15 the dates given in the indictment, the defendants, Mr.
16 Hendrix and Mr. Gavin, along with Mr. Turner, knowingly
17 participated in a conspiracy to unlawfully distribute and
18 possess with intent to distribute a controlled substance,
19 namely heroin. In support of this contention the Govern-
20 ment presented witnesses who testified, and you have heard
21 their testimony.

22 The Government contends that the defendant
23 Hendrix did in fact possess and distribute heroin in vio-
24 lation of the law and that the co-defendant, Mr. Gavin,
25 aided and abetted Hendrix in the commission of that crime

rdv 57

and that they were both participants in a conspiracy.

Defendant Hendrix denies that he was in the apartment, 12-H, at 405 East 105th Street on the evening of January 5, 1973, and of course denies that he is guilty as charged.

Defendant Gavin claims that he is the victim of mistaken identity.

Now, it must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show a witness the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification.

This danger will be increased if the police display to a witness only the picture of a single individual who generally resembles the person he saw, or if they show the witness the pictures of several persons among which there is a single photograph of such individual which reoccurs in the group, or that single photograph is somehow emphasized.

1 rdv 58

2 The chance of misidentification is also
3 heightened if the police indicate to the witness they
4 have other evidence that one of the persons pictured
5 committed the crime.

6 Regardless of how the initial misidentification
7 comes about on the part of the witness, the witness is
8 thereafter likely to retain the image of the photograph rather
9 than the person he actually saw, thus reducing the trust-
10 worthiness of any subsequent identification he might make
11 in court.

12 Therefore, for you to find that the witness,
13 Agent Clayton, has made a proper identification of
14 the defendant, Gerald Gavin, you must be convinced
15 beyond a reasonable doubt that he, Clayton, had sufficient
16 opportunity to observe defendant Gavin, quite apart from
17 any photographs he may have seen to enable him to make a
18 reliable in-court identification.

19 Now, I am about to read to you Count 1 of the
20 indictment. That is the conspiracy count.

21 "The grand jury charges from on or about the
22 first day of August, 1972, and continuously thereafter,
23 up to and including the date of the filing of this
24 indictment, in the Southern District of New York, Wincel
25 Hendrix, Gerald Gavin, also known as Jerry Golden, and

1 rdy 59

2 John Turner, the defendants, and others to the grand jury
3 unknown, unlawfully, intentionally and knowingly combined,
4 conspired, confederated and agreed together and with each
5 other to violate Sections 812, 841(a)1 and 841 (b)1A of
6 Title 21, United States Code. It was part of said con-
7 spiracy that the said defendants unlawfully, intentionally
8 and knowingly would distribute and possess with intent to
9 distribute Schedule I narcotic drug controlled substances.
10 The exact amount thereof being to the grand jury unknown,
11 in violation of Section 812, 841(a) 1 and 841 (b) 1A, Title
12 21, United States Code.

13 "Overt acts. In furtherance of said conspiracy
14 and to affect the objects thereof, the following overt
15 acts were committed in the Southern District of New York:

16 1) On or about January 5, 1973, defendants
17 Wincel Hendrix, Gerald Gavin, also known as Jerry Golden,
18 and John Turner went to Apartment 12-H, 405 East 105th
19 Street, New York, New York.

20 2) On or about January 5, 1973, defendant
21 Wincel Hendrix delivered to John Turner approximately
22 18 grams of heroin hydrochloride."

23 Now, you will recall that I referred to statutes
24 in the indictment and in the first count the statute which
25 the defendants are charged with violating is the Federal

1 rdy 60

2 Narcotics statute. They are charged, as I have said, with
3 conspiring to violate that statute.

4 Now, I want to point out that conspiracy to commit
5 a crime is a separate and distinct crime from the commission
6 of a crime itself. This indictment charges, as I have said,
7 that they conspired to violate the Federal Drug Act. That
8 statute, the conspiracy statute involved here is Title 21,
9 United States Code, Section 846. And that reads, in
10 pertinent part, as follows:

11 "Any person who conspires to commit any offense
12 prohibited by the laws of the United States with respect
13 to drug abuse, prevention and control, is guilty of a
14 crime."

15 Now, what is a conspiracy? A conspiracy is a
16 collective criminal agreement, a partnership in crime.
17 As I have told you, a conspiracy to violate a Federal
18 statute is a separate crime.

19 In order to prove the crime of conspiracy,
20 which is charged in Count 1, the Government must establish
21 to your satisfaction beyond a reasonable doubt each of the
22 following four essential elements of that crime:

23 First, the existence of the conspiracy as alleged
24 in the indictment; second, that it was a purpose of the
25 conspiracy as alleged in the indictment to violate Sections

1 rdv 61

2 812, 841 (a) 1 and 841 (b) 1A of Title 21, United States
3 Code as alleged in the indictment; third, that the defen-
4 dant, whom you are then considering, knowingly and will-
5 fully became a participant in or a member of the conspiracy;
6 fourth, that at least one of the overt acts set forth in
7 the indictment was committed knowingly, committed by at
8 least one of the co-conspirators in furtherance of the
9 conspiracy and during the period of the conspiracy
10 alleged in the indictment.

11 Now, I want to discuss each one of these four
12 elements in greater detail. The first, as I have said,
13 is you must find there was a conspiracy as alleged in the
14 indictment. In order to establish a conspiracy the Govern-
15 ment is not required to show that two or more persons sat
16 around a table and entered into a solemn pact, orally or
17 in writing, stating that they have formed a conspiracy to
18 violate the law, setting forth details of the plan, the
19 means by which the unlawful project is to be carried out,
20 or the part to be played by each co-conspirator.

21 Indeed, it would be extraordinary if there were
22 such a formal agreement or specific oral statement. Your
23 common sense will tell you that when men in fact under-
24 take to enter into a criminal conspiracy, much is left
25 to unexpressed understanding. Conspirators do not usually

1 rdv 62
2 reduce their agreements to writing or acknowledge them
3 before a Notary Public, nor do they publicly broadcast
4 their plans.

5 From its very nature a conspiracy is almost
6 invariably secret in its origins and execution. Therefore,
7 it is sufficient if you find that two or more persons in
8 any manner through any contrivance impliedly or tacitly
9 come to a common understanding to violate the law, express
10 language or specific words are not required to indicate
11 ascent or attachment to a conspiracy.

12 Nor is it required to find that all the co-
13 conspirators alleged in the indictment joined in the
14 conspiracy in order to find that a conspiracy existed.
15 You need only find that one alleged co-conspirator, or
16 the defendant or a defendant, entered into an unlawful
17 agreement with one or more other persons in order to find
18 that a conspiracy existed.

19 In determining whether there has been an unlawful
20 agreement you may judge acts and conduct of the alleged
21 co-conspirators which are done to carry out an apparent
22 criminal purpose.

23 Now in this connection the old adage, "Actions
24 speak louder than words" is applicable here. Usually the
25 only evidence available of a conspiracy is that of

1 rdv 63

2 disconnected acts, which, however, when taken together
3 in connection with each other show a conspiracy to secure
4 a particular result as satisfactorily and conclusively as
5 more direct proof.

6 Proof concerning the object of the accomplishment
7 of the conspiracy may be the most persuasive evidence of
8 the existence of the conspiracy itself. Success of the
9 venture, if you believe it was successful, may be the best
10 proof of the existence of the conspiracy.

11 In determining whether the conspiracy charged in
12 the indictment actually existed, you may consider the evi-
13 dence and the acts and conduct of the alleged conspirators
14 as a whole and the reasonable inferences to be drawn from
15 such evidence. If upon such consideration of all the evi-
16 dence you find beyond a reasonable doubt that the minds
17 of at least two of the alleged co-conspirators met in an
18 understanding way and that they agreed, as I have explained
19 the conspiratorial agreement to you, to work together in
20 furtherance of the unlawful scheme alleged in the indict-
21 ment, then proof of the existence of the conspiracy, but
22 only of its existence, is complete.

23 While the indictment charges that the conspiracy
24 began on or about August 1, 1972 and continued to on or
25 about July 9, 1973, it is not essential that the Government

rdv 64

1
2 prove that the conspiracy started and ended on or about
3 those specific dates. It is sufficient if you find that
4 in fact a conspiracy was formed and existed for some sub-
5 stantial time within the period set forth in the indict-
6 ment and that at least one of the overt acts was committed
7 in furtherance of the conspiracy during that period.
8

9 An overt act which you find did occur need not
10 have occurred on the specific date set forth in the indict-
11 ment. You need only find it occurred no earlier than August
12 1, '72, and no later than July 9, 1973.

13 Now, I want to discuss in greater detail the second
14 element of crime of conspiracy. The indictment charges
15 that the conspiracy had as an objective the violation of
16 Section 812 and 841 of Title 21, United States Code. These
17 are the Federal Drug Statutes. The Government must prove
18 the second element of the crime of conspiracy; that is,
19 it must prove that it was a purpose of the conspiracy to
20 violate the law which makes it unlawful to distribute or
21 possess with intent to distribute a controlled substance.

22 I will read Title 21, United States Code, Section
23 841 (a) 1, in pertinent part, and that provides as follows:

24 "Except as authorized by this subchapter it shall
25 be unlawful for any person knowingly or intentionally to
distribute or possess with intent to distribute a controlled

rdv 65

substance.

Now, Section 812 provides in pertinent part as follows:

"There are established five schedules of controlled substances, to be known as Schedules I, II, III, IV and V. Such Schedules shall initially consist of the substances in this Section."

In Schedule I it lists heroin as a controlled substance. Consequently, as I have said, you must find it was a purpose of the conspiracy to violate the Sections which I have just read.

Now we come to the third element. The third element which you must find is that a particular defendant, whom you are then considering, knowingly and willfully became a member of the conspiracy. If you conclude that a conspiracy as charged did exist and that its purpose was to violate the Federal Drug Statutes which I have just read, you must next determine whether the defendant you are then considering was a member of the conspiracy; that is, whether he participated in the conspiracy with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

A defendant's participation in the conspiracy, like its existence, can be inferred from such facts and

redv 66

circumstances in evidence as logically sustain that inference.

I want to caution you, however, that mere association of one defendant with an alleged co-conspirator does not establish his participation in the conspiracy if you find that one exists. So, too, the mere knowledge by a defendant of a conspiracy or any illegal act on the part of an alleged co-conspirator is not sufficient evidence to establish his membership in the conspiracy. You must find, as I have said, actual knowing participation by a particular defendant in the agreement to violate the law.

Now, an act is done knowingly if it is done voluntarily and purposefully, not because of accident, mistake, mere negligence or because of any other innocent reason. An act is done intentionally if it is done knowingly, willfully and with an evil motive or purpose. In determining whether a defendant has acted willfully, it is not necessary for the Government to establish that the defendant knew that he was breaking a particular law or any particular rule. It must, however, prove that the defendant had an evil motive or a bad purpose in mind. Knowledge and willfulness and intent of a defendant, as I told you before, need not be proved by direct evidence. Like any other

1 rdv 67

2 fact in issue, it may be established by circumstantial
3 evidence.

4 Once you are satisfied beyond a reasonable
5 doubt that a conspiracy as alleged existed and that the
6 defendant was a member of it, any acts and declarations
7 of any person whom you find was also a member of the con-
8 spiracy made during its pendency and in furtherance of
9 its objectives are considered the facts and declarations
10 of all of the members, even though the particular defen-
11 dant was not present at the time or knew that such state-
12 ments were made or such acts were done by others in
13 furtherance of the conspiracy.

14 Simply stated, and utilizing the partnership
15 analogy, by becoming a partner, a member of a conspiracy
16 assumes all the liabilities of the partnership.

17 Now, it is important to note that this principle
18 applies only to the acts and declarations done or made
19 during the continuance of the conspiracy and in furtherance
20 of the conspiracy and while the particular defendant was
21 a member of the conspiracy.

22 We come to the fourth and final element of the
23 crime of conspiracy. The offense of conspiracy is complete
24 only when the unlawful agreement is made and any single
25 overt act to affect the object of the conspiracy is thereafter

rdv 68

committed by at least one of the co-conspirators. Now an overt act is any step, action or conduct which is taken to achieve, accomplish or further the object of the conspiracy.

The purpose of requiring proof of an overt act is that while parties might conspire and agree to do an unlawful thing, they may change their minds or even abandon the project and do anything to carry it into effect. In which event it would not be an offense. The prosecution is not required to set forth in the indictment each and every act which it relies on to establish the conspiracy or the defendant's participation therein.

Nor is it required to prove each overt act which may have occurred during and in furtherance of a conspiracy. But it is required to prove that at least one overt act as charged in the indictment did take place here in the Southern District of New York, which includes Manhattan.

The overt act need not be criminal in itself. It may, for instance, as alleged in this case, consist of meetings of the defendant and the co-conspirators. The overt act, however, must be an act which bends toward the accomplishment of the plan or scheme charged in the conspiracy count. It must be knowingly done in furtherance of some object of the conspiracy charge.

If you find that the Government has failed to

1
2 establish beyond a reasonable doubt any one of the four
3 elements for the crime of conspiracy as to a particular
4 defendant which you are then considering, which I have just
5 enumerated and discussed for you, then you must find that
6 defendant not guilty of the charge of conspiracy.
7

8 On the other hand, if you find that the Govern-
9 ment has sustained its burden of proving each and every
10 one of the four elements of the crime of conspiracy as
11 to a particular defendant beyond a reasonable doubt,
12 then you may convict the defendant on that particular
13 count.

14 Now we come to the second count in the indictment.
15 That count reads as follows:

16 "The grand jury further charges on or about the
17 5th day of January, 1973, in the Southern District of New
18 York, Wincel Hendrix, Gerald Gavin, also known as Jerry
19 Golden, and John Turner, the defendants, unlawfully,
20 intentionally and knowingly did distribute and possess
21 with intent to distribute a Schedule I narcotic drug
22 controlled substance, to wit, approximately 18.02 grams
23 of heroin hydrochloride."

24 Now, the statute again which the defendants are
25 alleged to have violated is Sections 841(a) 1 of Title 21,
United States Code. Again, that section reads in pertinent

rdv 70

part as follows:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Now, before you can find a defendant guilty of the crime charged in Count 2, you must be convinced beyond a reasonable doubt that the Government has established each of the four elements of that count:

First, that on or about January 5, 1973 the defendant did possess a controlled substance; second, that on or about January 5, 1973, the defendant did distribute or possess with intent to distribute a controlled substance; third, that the defendant did so unlawfully, willfully, knowingly and intentionally; fourth, that the substance which has been received in evidence as Government's Exhibit 3 is in fact a controlled substance.

I want to discuss each one of those four elements in more detail. You will note that the first element is possession of a controlled substance. Now, what does possession mean? The law recognizes two kinds of possessions, actual and constructive possession. The person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, though

2 not in actual possession, knowingly has both the power and
3 intention at a given time to exercise dominion or control
4 over a thing, either directly or through another person or
5 persons, is then in constructive possession of it.

6 For example, some of you may have brought a
7 newspaper or magazine when you came to court this morning
8 and you left that magazine or newspaper in the jury room
9 for safekeeping. That magazine or newspaper is in your
10 possession even though you do not have it right here in
11 your hand. It would not even matter that someone else
12 had put the periodical in the jury room for you, as long
13 as you knew it was there and could go and get it or per-
14 haps even have someone else go and get it. The periodical
15 is there in your constructive possession, as I have just
16 defined it for you.

17 Now, the law also recognizes that possession may
18 be joint or sole. If one person alone has actual or
19 constructive possession of a thing, possession is sole.
20 If two or more persons share actual or constructive posses-
21 sion of the thing, possession is joint.

22 If you find beyond a reasonable doubt from the
23 evidence in the case that the accused, either alone or
24 jointly with others, was in actual or constructive
25 possession of the controlled substance, that is, Government's

1 rdy 72

2 Exhibit 3, then you may find that such defendant was in
3 possession of the controlled substance.

4 We come to the second element. You will note
5 that the second element is that the defendant did dis-
6 tribute or possessed with intent to distribute a controlled
7 substance. Now the word "distribute" means to deliver,
8 or even by administering or dispensing the narcotic drug
9 controlled substance.

10 The word "intent" refers to a person's state of
11 mind. So the term "possession with intent to distribute"
12 can be fairly stated to mean to control an item with a
13 state of mind or purpose to transfer or deliver that item.

14 Now, the third element was that the defendant did
15 so unlawfully, willfully, knowingly and intentionally.
16 "Unlawfully" means, of course, contrary to law. As I
17 told you before, an act is done knowingly if it is done
18 voluntarily and purposefully, not because of mistake,
19 accident or other innocent reason. An act is done will-
20 fully if it is done knowingly, deliberately, intentionally
21 and with an evil motive or purpose.

22 In determining whether a defendant has acted
23 willfully, it is not necessary for the Government to
24 establish that the defendant knew he was breaking any
25 particular law or any particular rule but it must show

rdv 73

a bad purpose or motive on the part of a defendant.

Knowledge and willfulness and intent of a defendant need not be proved by direct evidence. Like any other fact in issue it may be established by circumstantial evidence.

Now we come to the fourth element, and that is the indictment charges that the Schedule I controlled substances involved here was heroin hydrochloride. Now, as you know, there has been a stipulation entered into by the lawyers on both sides to the effect that if a chemist were called to testify here, his testimony would be that the substance contained in Government's Exhibit 3 is in fact heroin.

I instruct you, as a matter of law, that heroin hydrochloride is a Schedule I controlled substance within the meaning of the statute and as set forth in the statute. You, however, have to find this fourth element. As I said, you have to find that the Government did establish beyond a reasonable doubt that the substance in Government's Exhibit 3 is heroin hydrochloride.

There was some testimony here about Mr. Gavin's participation in a similar crime or another crime which was brought out on cross examination of Mr. Gavin. Now, that testimony or evidence is to be considered by you

rdv 74

only in assessing the credibility of Mr. Gavin. That is not evidence that he committed this crime, but it is evidence which you can consider in determining his credibility. You recall when he was asked whether he had been involved in drugs, and on cross examination he was asked whether he had given another package to Agent Bernhardt. As I have said, you may consider this on the issue of credibility of Mr. Gavin.

Now, the indictment, in addition to citing the Federal Drug Statutes which I have read and discussed, cite another Federal statute, and that is Title 18, United States Code, Section II. That is known as the aiding and abetting statute. That statute provides, in pertinent part as follows:

"Whoever commits an offense against the United States"--that means violates any of its laws--"or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Now, in addition to charging that both defendants violated the Federal statutes, Count 2 charges that the defendant violated the aiding and abetting statute. Accordingly, you may find a defendant guilty of the crime charged in that Count 2 if you find beyond a reasonable doubt that another person actually committed the offense and that that

1 rdy 75

2 particular defendant aided and abetted the commission
3 of that crime.

4 Now, there is no precise rule as to what acts a
5 defendant must perform in order to constitute him an aider
6 or abettor. It's enough if you find that a defendant know-
7 ingly associated himself in some manner with an illegal
8 venture. Actually participated in it as something he wished
9 to bring about, or that he sought by his actions to make
10 it succeed. In other words, the law is that one who aids
11 and abets another with knowledge of the unlawful nature of
12 the offense is just as guilty of that offense as if he
13 committed the offense himself.

14 To find a defendant guilty of aiding and abetting
15 you must, of course, find something more than mere know-
16 ledge on his part that a crime was being committed. Thus
17 a mere spectator at a crime is not a participant or an
18 aider or an abettor. Consequently, in order to find the
19 defendant guilty of aiding and abetting you must find that
20 that defendant with knowledge of the unlawful purpose in
21 some way associated himself with the illegal activity;
22 that he knowingly participated in it is something he wished
23 to bring about. And that he knowingly, by his actions,
24 endeavored to make it succeed.

25 Now, if you find that the Government has failed

rdv 76

to establish any one of the four essential elements of the second count which I have read and discussed for you, beyond a reasonable doubt as to the defendant you are then considering, then you must acquit the defendant of Count 2.

If, on the other hand, you find that the Government has established each and every one of these essential elements beyond a reasonable doubt as to a particular defendant, you may find that defendant guilty. Or if you find as to the second count that the Government has carried its burden of proving that a defendant aided and abetted the crime, as I have just described aiding and abetting to you, then you may find the defendant guilty.

Of course, if you find that the Government has failed to establish that a defendant aided and abetted a crime, then you must find that defendant innocent.

The jury is not to consider or in any way speculate about the punishment which a defendant may receive if he is found guilty. The function of a jury is to determine guilt or innocence and then it is for the Court or the Judge alone to decide what the punishment will be if a defendant is found guilty. So you are not permitted to discuss in your deliberations what the possible punishment of a defendant will be if he is found guilty. That is not a part of the jury's function.

1
2
3 Now, ladies and gentlemen, the most important
4 part of this case is now upon us, and that is the part
5 you are about to play as jurors, because it is for you
6 and you alone to decide whether the defendants are guilty
7 or not guilty. I know you will try the issues which have
8 been presented according to the oath which you have taken
9 as jurors.

10 In that oath you promised that you would well
11 and truly try the issues joined in this case and a true
12 verdict render. I suggest to you that if you follow
13 that oath and try the issues without combining your
14 thinking with any emotions, you will arrive at a just
15 verdict.

16 Now, it must be clear to you that once you get
17 into an emotional state and let fear or prejudice or
18 bias or sympathy interfere with your thinking, then you
19 will not arrive at a true and just verdict. And as you
20 deliberate, ladies and gentlemen, please be careful to
21 listen to the opinions of your fellow jurors as well as
22 to ask for an opportunity to express your own views.

23 No one juror holds the center stage in the jury
24 room and no one juror may control or monopolize the dis-
25 cussion. If, after listening to your fellow jurors and if
after stating your own view you become convinced that your

rdv 78

view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view. On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you're outnumbered.

In a federal court your verdict as to each defendant, as to each count must be a unanimous verdict and must reflect the conscientious convictions of each and every one of you. As I have told you, the form of your verdict is either guilty or not guilty and must be returned separately as to each defendant as to each count.

Now, you may find a defendant guilty as to each count, you may find a defendant not guilty as to each count, you may find a defendant guilty as to one count and not guilty as to another count. You are instructed that it is important to both the Government and the defendants that this case be decided as to each count. If you are unable to agree to a verdict on one or more counts as to one or more of the defendants, you may not compromise by agreeing to a guilty verdict on one or more of the counts and a not guilty on the others.

You are instructed that you are not to reveal the standing of the jurors, that is the split of the vote for any verdict, to anyone at any time, including the Court,

1 rdv 79

2 if that should occur during the course of your delibera-
3 tions.

4 Now, will the lawyers please approach the bench.

5 (At the side bar.)

6 (In the robing room.)

7 THE COURT: Do you have any exceptions to the
8 charge?

9 MR. POLLAK: I have no exceptions, your Honor.

10 MR. McKELLER: I have no exceptions.

11 MR. SHATTEN: I have no exceptions.

12 MR. POLLAK: I do have one thing. I may have
13 missed it but did your Honor charge them as to the fact
14 they could have a portion of the testimony reread?

15 THE COURT: No, I did not.

16 MR. POLLAK: I would respectfully request that you
17 charge that and they could also get an additional charge
18 from the Court .

19 THE COURT: No, we don't instruct that.

20 MR. SHATTEN: And the exhibits, as well, your
21 Honor.

22 THE COURT: I will tell them that.

23 (In open court.)

24 THE COURT: Ladies and gentlemen, at this time
25 we will excuse the alternate juror, Mrs. Bertha Mae Roddy.

